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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1875

ENERGY CONSUMERS AND PRODUCERS ASSOCIATION, INC.,
Petitioner,

VERSUS

DEPARTMENT OF ENERGY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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May 27, 1980

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VERSUS

DEPARTMENT OF ENERGY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The petitioner Energy Consumers and Producers Association, Inc. ("ECPA") respectfully petitions that a writ of certiorari issue to review the judgment and opinion entered in this proceeding on April 4, 1980.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals, not yet reported, appears in the Appendix together with the Judgment and Memorandum Opinion of the United States District Court for the Eastern District of Oklahoma.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on April 4, 1980. A timely petition for rehearing *en banc* was denied on April 28, 1980, and this petition was filed within 30 days. A copy of the order denying rehearing is in the Appendix. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. What are the proper limits of the subject matter jurisdiction of the Temporary Emergency Court of Appeals?

2. When is a rule interpretative and, therefore, excepted from the notice requirement of the Administrative Procedure Act?

STATUTORY PROVISIONS INVOLVED

1. Section 211(b)(2) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note provides in pertinent part:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder.

This grant of limited jurisdiction was incorporated by reference into Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1975. 15 U.S.C. § 754(a)(1).

2. Section 4(a) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(A), provides in pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register . . .
>
> * * *
>
> Except when notice or hearing is required by statute, this subsection does not apply —
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . .

STATEMENT OF THE CASE

The ECPA[1] complained against the Federal Energy Administration, now the Department of Energy ("DOE"), seeking a judgment declaring two "rulings" invalid. Part III of Ruling 1975-12 dealing with the stripper well exemption from crude oil price controls is the one in issue here and was challenged on the grounds that its promulgation did not comply with the Administrative Procedure Act, particularly the notice requirement. See 5 U.S.C. § 553. Federal jurisdiction is provided by 15 U.S.C. §§ 754(a)(1) and 766. See also 28 U.S.C. § 1331.

The District Court held in favor of the ECPA on the issue concerning Ruling 1975-12.[2] The reasons stated in its

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[1] The Complaint was brought by Oklahoma Association of Energy Consumers and Producers whose name was subsequently changed to Energy Consumers and Producers Association.

[2] On the issue of the other ruling the District Court held in favor of the Government. ECPA appealed to the Court of Appeals for the Tenth Circuit. It dismissed the appeal for lack of jurisdiction and its opinion is in the Appendix. *Oklahoma Association of Energy Consumers and Producers* v. *Federal Energy Administration,* No. 79-1847 (10th Cir., Oct. 23, 1979).

Memorandum Opinion are that the Ruling was invalid because it is not interpretative and, thus, the Administrative Procedure Act required notice.

The DOE appealed to the Temporary Emergency Court of Appeals ("TECA"). ECPA's motion to dismiss for lack of subject matter jurisdiction was denied.

The ECPA argued that the TECA did not have jurisdiction, for the case does not arise under either the Economic Stabilization Act or the Emergency Petroleum Allocation Act. In its opinion the TECA shields its jurisdiction with only a quotation from a footnote in one of its prior decisions (App., pp. A-20 - A-21). It ignores decisions of this Court and others holding that the TECA's limited jurisdiction as a special court extends only to appeals where the issues adjudicated concern the substantive provisions of the crude oil price regulation scheme.

On the rule making issue the decision holds that the DOE was not obliged to provide notice prior to adopting Ruling 1975-12. We would submit that Congress did not intend for agencies to have a free hand to enact such rulings without opportunity for comment. Furthermore, decisions discussing the notice requirement are unclear. It is a matter where the agencies could benefit by explicit guidelines from this Court.

Both questions cause confusion and need to be set to rest.

REASONS FOR GRANTING THE WRIT

1. THE DECISION CONFLICTS WITH A PRIOR DECISION OF THIS COURT.

It is fundamental that parties should not be required to guess, at their peril, where an appeal lies or be required to appeal a decision to more than one court. Nevertheless, that is the situation which exists today in federal energy law disputes.

By the Economic Stabilization Act, Congress set about upon a program intended to create better economic conditions and to stabilize wages and prices. It perceived that the executive branch needs authority to act promptly. See Section 202 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. Accordingly, the TECA was created as a special court to ". . . expedite the determination of cases over which it has jurisdiction under this title." *Id.* at Section 211(b)(1).

Its limited jurisdiction is for review ". . . in cases and controversies arising under this title or under regulations or orders issued thereunder." *Id.* at Section 211(b)(2). The Congressional reasoning is obvious. The scheme was originally for control of an emergency involving complex regulations for the production, refining and distribution of petroleum products. The existence of an appellate court possessing familiarity and special expertise, gained by repetition, should provide expedited and consistent resolution of disputes concerning it.

This case, however, concerns only issues of administrative law and is thus without the special jurisdictional justification.

The TECA chooses to leave unmentioned this Court's only decision touching the issue, *Bray* v. *United States*, 423 U.S. 73 (1975). Bray was convicted of criminal contempt for failing to comply with a subpoena issued under the Economic Stabilization Act and appealed to the Tenth Circuit. It dismissed his appeal saying it belonged in the TECA.

This Court reversed and remanded to the Tenth Circuit. The opinion explains the reasons for the special court and says that "[r]eview in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme. Indeed, a requirement of such review would only serve to undermine the prompt resolution of Stabilization Act questions by burdening the TECA with additional appeals." 423 U.S. at 75.

We seek opportunity to show that the same good logic should apply to review of general administrative law issues — and, as well, to all issues other than those tied directly to the price control program. And, regardless of the final decision, the administration of justice in the developing energy law field requires predictability in a matter so basic as the proper appellate forum.

2. THE DECISION IS IN CONFLICT WITH THOSE OF OTHER COURTS OF APPEALS.

The Court of Appeals for the Second Circuit has taken another, unusual, approach holding that the proper procedure for review is one of dual appeals. *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979), began as an action on contract and the defendant raised a defense based upon a price control regulation which was rejected. It noticed appeals in *both* the TECA and Second Circuit, and moved to transfer the latter to the TECA.

The decision holds that the TECA's jurisdiction is dependent upon the issue actually adjudicated by the district court; that the TECA would relinquish any other issues; and that an appellant who may be in doubt must take two appeals. If this novel procedure is proper we believe this Court should be the one to resolve and explain it.

The Court of Appeals for the Tenth Circuit has spoken of the bifurcated appeals procedure by saying "[t]here is little to be gained, however, other than mass confusion, by the promoting of simultaneous circuit court-TECA appeals." *Oklahoma Ass'n of Energy Consumers and Producers* v. *Federal Energy Administration* (10th Cir., Oct. 23, 1979) (App., p. A-34). It then held that since the Ruling under consideration did involve a regulation dealing with substantive provisions the appeal was, correctly, to the TECA.

The confusing and inconsistent status of a rule which ought to be absolutely fundamental is exemplified still further by the TECA's own rulings on the subject. In a most recent decision the appellant guessed wrong and lost

his right to be heard. See *United States* v. *Wickland,* No. 9-45 (Temp.Emer.Ct.App. filed Apr. 18, 1980). There Wickland was served with a subpoena to produce records and was ordered to comply by the district court. He appealed to the Ninth Circuit which transferred the appeal to the TECA. Wickland relied upon the rationale of *Coastal States, supra,* and argued that the district court had "adjudicated" only general issues of subpoena enforcement which did not require any special expertise. The TECA, interestingly, again chose not to mention this Court's holding in *Bray* v. *United States, supra,* and said that ". . . 'general questions of administrative law' are clearly interwoven with provisions of the ESA and EPAA and invoke policy questions directly affecting the EPAA and its enforcement." *United States* v. *Wickland, supra* (Slip op. at 7-8). This now creates an additional standard for determining the proper appellate forum — the "interwoven policy question" jurisdictional theory.

In attempting to choose the correct court an appellant has obvious dilemmas. Does he make his decision based upon whether or not the appeal will turn upon a "substantive" issue as in *Bray, supra*? Does he decide by pondering whether or not the question "adjudicated" by the district court was an "ESA issue" as in *Coastal States, supra*? Alternatively, does he decide by speculating whether or not there is an "interwoven policy question" which might affect the EPAA or its enforcement as in *United States* v. *Wickland, supra*? Or, does he appeal simultaneously to multiple courts and, in the Tenth Circuit's language, create "mass

confusion"? *Oklahoma Ass'n of Energy Consumers and Producers* v. *Federal Energy Administration, supra.*[3]

That a party seeking review of a judgment should face dilemmas like this concerning a matter so basic is absurd to the point of injustice, lacking essential due process of law.

Even though the proper appellate procedure may not be clear, it is evident that there is a conflict between the Courts of Appeals.

3. THE DECISION CONCERNS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

In times of ever increasing lawmaking by administrative agencies, they need settled guidelines explaining when affected parties are entitled to notice and opportunity to comment.

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[3] See also *United States* v. *Cooper,* 482 F.2d 1393, 1398-1399 (Temp. Emer. Ct. App. 1973); *Associated General Contractors of America, Inc.* v. *Laborers Int'l Union Local 612,* 489 F.2d 749 (Temp. Emer. Ct. App. 1973); *City of Groton* v. *Federal Power Commission,* 487 F.2d 927, 936 (Temp. Emer. Ct. App. 1973); *Spinetti* v. *Atlantic Richfield Company,* 522 F.2d 1401, 1403 (Temp. Emer. Ct. App. 1975); *Municipal Electric Utility Ass'n* v. *Federal Power Comm'n,* 485 F.2d 967, 970 (D.C. Cir. 1973); *Whelan* v. *Brinegar,* 538 F.2d 924 (2d Cir. 1976); *Gordon* v. *Laborer's Int'l Union of North America,* 490 F.2d 133, 139 (10th Cir. 1973), *cert. denied,* 419 U.S. 836 (1974); *Texaco, Inc.* v. *DOE,* No. 78-1433 (Temp. Emer. Ct. App. filed Oct. 15, 1979) and *Quincy Oil, Inc.* v. *FEA,* No. 1-5 (Temp. Emer. Ct. App. filed April 24, 1980).

That the jurisdictional question should have fostered so many decisions in the short period of the TECA's existence further exemplifies the confusion.

The DOE ruling in issue here is Part III of Ruling 1975-12 which is part of the exemption from price controls provided for stripper wells.[4] See 15 U.S.C. § 757(i) and 10 C.F.R. 210.32. In sum, the exemption pertains to wells having daily production not in excess of 10 barrels of crude oil. The Ruling deals with wells whose production comes from multiple formations.

The ruling was issued without notice. The only excuse claimed is that the ruling is "interpretative" and, thus, excepted from the notice requirement by 5 U.S.C. § 553 (b)(A).

The District Court held that this ruling did not qualify for the exception. The TECA reversed, saying it was interpretative and, therefore, valid without notice.

Unfortunately or perhaps inevitably, the law in this area, especially as applied in the TECA, has sunk to a level of games playing with meaningless labels and catchwords. In order to determine rights of basic importance, agencies and courts are caught up in attempts to decipher phrases such as "substantial impact", "rational basis", "contemporaneous construction", "judicial deference" and others, almost to the point of ridicule. The question of when an agency must afford notice deserves a clear answer in the interests of good administration of governmental policy.

The decision rendered by the TECA in our case shows the need for meaningful standards. The gist of the holding is that Ruling 1975-12 is interpretative because it interprets

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[4] The pertinent part of the Ruling is set out in the TECA's decision. See Appendix, pp. A-3 - A-5.

something or nothing. For this proposition it cites 1 Davis, *Administrative Law Treatise* § 5.03, at 304 (1st ed. 1958). The same paragraph of the treatise, however, goes on to say:

> . . . The theory [relied upon by the TECA] may have a useful purpose and it may have in it an element of validity. But for those who are more concerned with immediate realities than with metaphysical brooding, the plain fact is that giving specific meaning to vague or ambiguous or nonexistent words of a statute is often creative law making, whether or not the court or officer talks about the task in terms of discovering the legislative intent. The Supreme Court increasingly acknowledges that what is commonly called interpretation is in truth the creation of law.

Id. at 304-305.

Persons whose businesses and personal affairs are severely affected by administrative acts are, quite definitely, interested in the resulting "immediate realities."

Since the decision for which we seek review relies upon a previous one of the same Court, delivered by the same Judge, it also deserves some attention. In *Energy Reserves Group, Inc.* v. *DOE*, 589 F.2d 1082 (Temp.Emer. Ct.App. 1978), another stripper well "ruling" was held to be within the interpretative exception. There we again confront the perplexing standard that a ruling was interpretative because the agency applied that label to it; that since it interprets something it is interpretative; and that the "impact" of a ruling is not a factor in considering its procedural validity. *Id.* at 1092. The decision also quotes Professor Davis concerning the distinction between interpretative and legislative rules saying that ". . .the Supreme

Court apparently has never provided a full-bodied discussion of it." *Id.* at 1093.

Statements of this Court indicate that the TECA is encouraging the agencies to follow an improper course. See *Chrysler Corp.* v. *Brown,* 441 U.S. 281 (1979); *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759 (1969); *Morton* v. *Ruiz,* 415 U.S. 199 (1974); *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976); *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944) and *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519 (1978). These authorities all point to a rule that the standards of the Administrative Procedure Act require notice in all but the most rare cases.

We submit that with increasing administrative activity aimed at controlling fundamental rights the time is at hand for a definitive statement explaining when the agencies must provide notice.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Temporary Emergency Court of Appeals.

Respectfully submitted,

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May 27, 1980

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 10-21

ENERGY CONSUMERS AND
PRODUCERS ASSOCIATION, INC.,
formerly OKLAHOMA ASSOCIATION OF
ENERGY CONSUMERS AND PRODUCERS, INC.,
PLAINTIFF-APPELLEE,

v.

DEPARTMENT OF ENERGY,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Eastern District of Oklahoma

(Argued: November 16, 1979 Decided: April 4, 1980)

DINA R. LASSOW, of the Department of Justice, with whom Alice Daniel, Acting Assistant Attorney General, of the Civil Division, Department of Justice, C. Max Vassanelli, of the Department of Justice, Washington, D.C., John P. McKenna, Arthur E. Gowran, and Frank W. Krogh of the Office of General Counsel, Department of Energy, Washington, D.C., were on the brief for defendant-appellant Department of Energy.

FRED A. GIPSON of Seminole, Oklahoma, with whom Richard L. Bohanon and Lynn A. Pringle, of Bohanon & Barth, Oklahoma City, Oklahoma and Richard S. Roberts of Wewoka, Oklahoma, were on the brief for plaintiff-appellee, Energy Consumers and Producers Association, Inc., formerly Oklahoma Association of Energy Consumers and Producers, Inc.

Before CHRISTENSEN, JOHNSON and BECKER, Judges

BECKER, Judge.

On this appeal the appellant Department of Energy (DOE) assigns error in the ruling of the district court ad-

judging invalid Part III of Ruling 1975-12, which was issued on August 29, 1975 by the General Counsel of the Federal Energy Administration (FEA), predecessor of DOE, as an interpretative ruling, without prior public notice and opportunity to comment required by paragraphs (b) and (c) of § 553, Title 5 U.S.C., a part of the Administrative Procedure Act (APA), codified as Subchapter II, § 551 to § 559 inclusive, Title 5 U.S.C. Ruling 1975-12 was first published on September 4, 1975. (40 F.R. 40828.)

Part III of Ruling 1975-12 purported to interpret the exemption from price control of crude oil produced from "stripper wells," provided in successive statutes and regulations of DOE and its predecessors FEA, Federal Energy Office (FEO) and Cost of Living Council (CLC). The statutory and regulatory history of the "stripper well" exemption, material to this appeal, is fully and accurately set forth in the original majority and dissenting opinions in *Energy Reserves Group, Inc.* v. *Department of Energy* (TECA 1978) 589 F.2d 1082, explained in *Duncan* v. *Theis* (TECA 1979) ____ F.2d ____, (No. 10-22, December 27, 1979).

The successive statutes and regulations described in the opinions in *Energy Reserves Group, Inc.* v. *Department of Energy, supra,* imposed an emergency mandatory system of allocation and control of prices of petroleum products from which crude oil produced from "stripper wells" was exempt. In § 4(e)(2)(A) of the Emergency Petroleum Allocation Act (EPAA), P.L. 93-159, 87 Stat. 627, effective in 1973, the statutory "stripper well" exemption was as follows:

> The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed 10 barrels per well.

Regulations defining the stripper well exemption were promulgated successively by CLC and FEA. § 150.54(s),

6 C.F.R. (page 146) (1974) and § 210.32, 10 C.F.R. (page 98) (1976). The formula for determining "average daily production" as used in the statutes was consistently defined in the regulations of CLC and FEA as follows:

> (b) Definitions: "Average daily production" means the qualified maximum total production of crude oil, including condensates, produced from a property, divided by a number equal to the number of days in the year times the number of *wells that produced crude oil, including condensates,* from that property in that year. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production. [Emphasis added.] *Energy Reserves Group, Inc.* v. *Department of Energy, supra,* (TECA 1978) 589 F.2d at 1091.

In 1975 FEA found it desirable to issue Ruling 1975-12, Part III, purporting to interpret the application of the regulations and underlying statute defining the stripper well exemption to multiple completion wells. Part III of Ruling 1975-12 is as follows:

> III. *Multiple Completion Wells.*—Where a property encompasses the right to produce crude oil from two or more producing formations or reservoirs, producers sometimes utilize a production technique involving "multiple completion wells." This technique, which makes use of an existing well that produces from one formation, involves drilling from the existing casing separate well-bores or elongating existing well-bores in order to reach other formations. By the installation of additional tubing strings, crude oil may in this manner be produced concurrently from two or more formations. A multiple completion well is to be distinguished from a "recompleted well", which involves the

technique of drilling a separate well-bore from an existing casing in order to reach the same reservoir, or redrilling the same well-bore to reach a new reservoir after production from the original reservoir has been abandoned. While a multiple completion well involves the simulataneous production from two or more reservoirs, a recompleted well involves production from only one formation.

Thus, a multiple completion well is designed to accomplish the same task as two or more separate and distinct prodcing wells, although conserving initial capital outlay, it functions in many ways as two or more separate producing wells: Crude oil from each formation remains isolated in distinct tubing strings until reaching the surface, where it may either be commingled with crude oil from other formations, or may continue to be diverted separately through alternative chokes and valves in the well-head "Christmas tree" fitting. In this way, differences in API gravity, sulphur content and mineral impurities that might be characteristic of different formations, can be maintained.

Although a multiple completion well is a somewhat less costly alternative to drilling an entirely separate well in order to reach another producing formation in the field, it nevertheless represents a significant capital investment and poses certain additional problems beyond those encountered with single or separate wells. For example, the artificial lift in a multiple completion well is more complicated and, correspondingly more costly to install. Furthermore, repairs to any of the intervals are more costly than in separate wells and can result in a temporary shut-down of production from all reservoirs.

Therefore, the FEA has determined that multiple completion wells may be considered as two (or more) wells for the purpose of calculating "average daily pro-

duction" pursuant to the stripper well lease exemption of 10 CFR 210.32 if,

(a) The well consists of two (or more) separate tubing strings run inside the casing, each of which carries crude oil from a separate and distinct producing formation, *and*

(b) the production capabilities of each formation are unaffected by any change in the production level of any other formation producing through the same well.

This result is consistent with the congressional policy of increasing the incentive and economic feasibility of maintaining production of crude oil from stripper well leases through advanced production techniques.

Application of Part III of Ruling 1975-12 To "Commingled Wells"

The district court properly described the administrative application of Part III of Ruling 1975-12 to the problem created by claims of the plaintiff-appellee (appellee) on behalf of its members in the following parts of its Memorandum Opinion (Tr. 876 at pages 878-879):

> OAECP alleges that Ruling 1975-12 as applied to commingled wells is arbitrary and capricious. Further, OAECP alleges that the rule was improperly adopted by the FEA and is void. FEA contends that Ruling 1975-12 is an interpretive rule and, as such, is not subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553.
>
> A multiple completion well produces crude oil from several oil bearing formations by utilizing a common well casing while segregating the oil produced from each formation into a separate tubing string. A commingled well is similar to a multiple completion well in that it also produces crude oil from two or more oil bearing formations through a common well casing. However, a commingled well does not segregate the

oil from each formation but produces the oil from the several formations through a single tubing string. Thus the crude oil from any single oil producing formation is mixed with the crude oil from all other oil-producing formations which have been tapped through the common well casing.

Several of the members of OAECP are engaged in the production of crude oil through the utilization of commingled wells in which one or more of the oil producing formations produced less than ten barrels per day at the time the well was completed as a commingled well. However, now that the well is being operated as a commingled well, the amount of crude oil produced through the well from all of the oil producing formations which have been tapped through the common well casing totals in excess of ten barrels per day. These members have previously sold the oil produced, or portions of it, at the unregulated market price in the belief that if one of the oil producing formations in the commingled well was producing a certain amount of oil at the time the formations were commingled, and the amount of oil produced from that formation would qualify a single completion well as a stripper well, the amount of oil produced from that formation in a commingled well would also qualify for stripper well status. FEA disagreed. FEA adopted the position that it is not possible to accurately determine in a commingled well how much oil is being produced from a formation at any given time while such determination is readily made in a multiple completion well. In adopting this position, FEA determined that commingled wells would not qualify for consideration as two (or more) wells for the purpose of calculating average daily production under the stripper well lease exemption. As a result, FEA cited members of OAECP for selling crude oil at a price in excess of the ceiling price and issued remedial orders requiring those members to make reimbursement for alleged overcharges.

Contrary to its contentions in this appeal, appellee confirms the uniform consistent application by FEA of Part III of Ruling 1975-12 in the following language in its brief:

> The primary issue in controversy between Plaintiff and the FEA is this: Should a commingled well which produces simultaneously from more than one reservoir be counted as more than one well for the purpose of the stripper well lease execption [*sic*]. In every decision on this issue the agency has said "no," basing its orders and denials of appeals from those orders exclusively on Ruling 1975-12. (Appellee's Brief, 1.)

(This last phrase ignores the underlying statute and regulation, but the quotation concedes the uniformly consistent administrative construction of the stripper well exemption.)

Trial Court Proceedings

Appellee Energy Consumers and Producers Association, Inc. [formerly Oklahoma Association of Energy Consumers and Producers, Inc. (OAECP)] a non-profit corporation, filed the complaint in this action in the United States District Court for the Eastern District of Oklahoma, on behalf of its members producing oil from "commingled wells" that were denied the benefit of the stripper well exemption by application of Part III of Ruling 1975-12. The complaint sought declaratory and injunctive relief against FEA in three claims for relief (each denominated as a "cause of action"). (Transcript [Tr.] 8-15.) The relief granted on the first and third claims for relief are the subject of this appeal by appellant DOE (successor to FEA).

In the first claim for relief appellee sought a retroactive and prospective declaratory judgment that Part III of Ruling 1975-12 was invalid and void because (a) it exceeded the statutory authority of FEA; (b) its adoption and application were unlawful, arbitrary and capricious, and an abuse of discretion; (c) it was contrary to "constitutional right, power or privilege"; (d) its issuance was "without

observance of procedure required by law"; (e) it was "wholly unwarranted by the facts and the prudent and economic production of crude oil" and "will cause waste and does not facilitate the measurement of oil produced from separate formations"; (f) its retroactive application "is contrary to statutory or constitutional authority"; and (g) its prospective application violates due process rights of Amendment V of the Constitution of the United States. (Tr. 5.)

The third claim for relief sought injunctive relief against enforcement of Ruling 1975-12 on the same factual and legal contentions of the first claim for relief.

Other factual and legal contentions of the complaint concern a separate controversy and are not material to this appeal.

FEA filed an answer (Tr. 16-21), and moved to dismiss the action on the grounds the appellee lacks standing to sue because (1) it is not representative of its members; (2) it has not established that its members are suffering from immediate harm; and (3) its members are indispensable parties. (Tr. 34.) This motion was denied by the Honorable Joseph W. Morris, the district judge to whom this action was assigned for pretrial proceedings and trial. (Order Denying Motion to Dismiss, Tr. 34-37.)

FEA filed a motion for summary judgment, supported by affidavits and exhibits, on the issue of validity of Ruling 1975-12 on the ground that it was an interpretative ruling exempt from the notice and comment procedures of the APA under § 553(b) and (c), Title 5 U.S.C., and otherwise lawful and valid. (Tr. 38-131.) The district court denied the motion of FEA for summary judgment. (Tr. 265-266.)

The action was tried without a jury, on the merits by the district judge to whom the action was originally assigned. (Tr. 284-789.) That district judge, Judge Morris, resigned and the parties agreed to submit the action for

decision by the Honorable H. Dale Cook, United States District Judge, on the transcript of the trial before Judge Morris. (Tr. 799.)

Decision by the District Court

On June 29, 1979, the district court field a memorandum opinion holding that Part III of Ruling 1975-12 was "void for lack of proper agency procedures and consideration for its adoption." (Tr. 876.) Because of the novely of one of the two bases for this conclusion and to make clear the other basis, the following material parts of the opinion of the district court are set forth verbatim (Tr. 879-883):

> In 1946, Congress passed the Administrative Procedure Act, Pub.L. 79-404, 60 Stat. 237. As originally enacted, the rulemaking portion of the Administrative Procedure Act (APA) stated in part:
>
> RULE MAKING
>
> Sec. 4. Except to the extent that there is involved (1) any military, naval or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—
>
> (a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general state-

ments of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding in a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The APA survived essentially unchanged until September 6, 1966 when Congress codified the general and permanent laws relating to the organization of the government as Title 5 United States Code. At that time, the APA became Chapter 5 of Title 5, and Section 4, quoted above, became codified as 5 U.S.C. § 553 as follows:

§ 553. Rule making.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

By comparing Section 4 of the APA with 5 U.S.C. § 553, it is readily apparent that any changes of substantive law that have occurred during the process of codification, at least so far as the above quoted provisions are concerned, are minimal. Therefore, for a proper understanding of the intent of Congress in enacting section 4 of the APA and its successor, 5 U.S.C. § 553, it is appropriate to look to legislative reports that originally accompanied the APA. Such a report is the legislative history of the APA contained in House Report No. 1980 by the House Committee on the Judiciary dated May 3, 1946 *reprinted in* (1946) U.S. Code Cong. Serv. 1195. This report begins with a discussion of the recognized importance of the legislation by stating:

> For more than 10 years this legislation has been under consideration. Certainly no measure of like character has had the painstaking and detailed study and drafting. Both the legislative and executive branches have participated, and private interests of every kind have had an opportunity to present their views. In the legislative branch

> there have been four major proposals for the creation of an administrative court, and at least eight for the regulation of administrative procedure. Two important studies were conducted in the executive branch under the late President Franklin D. Roosevelt—each resulting in reports to Congress with legislative recommendations. Private individuals and organizations have made innumerable studies and recommendations. While various proposals have been made over the years, the continuous line of development leading to the present bill is clear and illuminating.

1946 U.S. Code Cong. Serv. at 1195. In reviewing the 1937 report of the Presidential Committee on Administrative Management, the Judiciary Committee noted:

> The problem has been how to deal with (administrative functions) in our complex governmental setup, without unduly interfering with necessary governmental operations.

1946 U.S. Code Cong. Serv. at 1196. By noting the 1938 Senate hearings on the creation of an administrative court, the committee stated:

> There is need for a simple and standard plan of administrative procedure, together with the statement of legal and enforceable guides for administrative officers and agents in their daily operations. In short, an important object of any legislation in this field is not only to provide judicial redress but to assure administrative fairness in the beginning so that litigation may become unnecessary.

1946 U.S. Code Cong. Serv. at 1196. In discussing the substance of the APA, the Judiciary Committee stated:

> Manifestly the bill does not unduly encroach upon the needs of any legitimate government operation, although it is of course operative according to its

terms even if it should cause some administrative inconvenience or changes in procedure.

* * * *

The bill is an outline of minimum essential rights and procedures. Agencies may fill in details, so long as they publish them. It affords private parties a means of knowing what their rights are and how they may protect them, while administrators are given a simple framework upon which to base such operations as are subject to the provisions of the bill.

* * * *

In the "rule making" (that is, "legislative") function it provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before the issuance of general regulations (sec. 4).

* * * *

The public-information provisions of section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency "housekeeping" arrangements may be involved. Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases.

1946 U.S. Code Cong. Serv. at 1024-5.

Thus, it is clear that the Congressional intent in formulating the APA was more than a desire to standardize the procedures utilized by the various agencies but included an attempt to provide for procedures that would recognize the fundamental fairness of gov-

ernmental operations being conducted in full view of the governed.

In issuing its Ruling 1975-12, the FEA has stipulated that the procedures in 5 U.S.C. § 553 were not followed, at least as to section 3 of the ruling. The government contends that the ruling qualifies as an interpretative rule under 5 U.S.C. § 553(b)(A) and, as such, does not require notice or hearing. However, for this agency determination to survive, the rule promulgated cannot be more than an "internal agency 'housekeeping' arrangement." Such is simply not the case here.

The creation of the FEA by Congress through the Federal Energy Administration Act was accompanied by administrative provisions the FEA was to apply. These provisions were contained in section 7 of the act and state, in part:

> (i)(1)(A) Subject to paragraphs (B), (C), and (D) of this subsection, the provisions of subchapter II of chapter 5 of title 5, United States Code, shall apply to any rule or regulation, or any order having the applicability and effect of a rule as defined in section 551(4) of title 5, United States Code, issued pursuant to this Act, including any such rule, regulation, or order of a State or local government agency, or officer thereof, issued pursuant to authority delegated by the Administrator.
>
> (B) Notice of any proposed rule, regulation, or order described in paragraph (A) shall be given by publication of such proposed rule, regulation, or order in the Federal Register. In each case, a minimum of ten days following such publication shall be provided for opportunity to comment; except that the requirements of this paragraph as to time of notice and opportunity to comment may be waived where strict compliance is found to cause serious harm or injury to the public health,

safety, or welfare, and such finding is set out in detail in such rule, regulation or order. In addition, public notice of all rules, regulations, or orders described in paragraph (A) which are promulgated by officers of a State or local government agency shall to the maximum extent practicable be achieved by publication of such rules, regulations, or orders in a sufficient number of newspapers of statewide circulation calculated to receive the widest possible notice.

(C) In addition to the requirements of paragraph (B), if any rule, regulation, or order described in paragraph (A) is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, an opportunity for oral presentation of views, data, and arguments shall be afforded. To the maximum extent practicable, such opportunity shall be afforded prior to the issuance of any such rule, regulation or order. A transcript shall be kept of any oral presentation.

(D) Any officer or agency authorized to issue the rules, regulations, or orders described in paragraph (A) shall provide for the making of such adjustments, consistent with the other purposes of this Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens and shall, by rule, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, rescission of, exception to, or exemption from, such rules, regulations and orders. If such person is aggrieved or adversely affected by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the officer or agency and may obtain judicial review in accordance with paragraph (2) of this subsection when

> such denial becomes final. The officer or agency shall, by rule, establish appropriate procedures, including a hearing where deemed advisable by the officer or agency, for considering such requests for action under this paragraph.

Thus, under these procedures, it would appear that the congressional intent in setting a procedural requirement in addition to those of the APA was to have the FEA conduct its operations subject to even more public scrutiny than the average administrative agency. Additionally, under section 7(i)(1)(c), quoted above, it would appear that even if a ruling of the FEA were deemed to be interpretative under 5 U.S.C. § 553(b)(A), it would still be required to afford an opportunity for public comment if it were likely to have a "substantial impact" on either the national economy or large numbers of individuals or businesses.

The evidence at trial shows that at the time the wells were commingled, one or more of the producing formations involved produced less than ten barrels of crude oil per day. Acting on the clear legislative statement that wells producing less than ten barrels per day were to be exempt from the pricing restrictions, the producers treated the recovered crude oil as coming from separate wells and attempted to apportion the crude oil among the producing formations and set its price accordingly. The FEA then adopted its regulation, without notice or opportunity for comment, which determined that the producers were selling crude oil at illegal prices. The FEA now adopts the position that the regulation is valid since it is practically impossible to determine which oil producing formation is actually contributing a specific quantity of crude oil to the commingled total. The FEA in section 3 of Ruling 1975-12 makes reference to justifying treating multiple completion wells as separate wells at each producing formation because of the capital investment separate

single completion wells would require; however, the statute exempting wells producing less than ten barrels of crude oil per day is silent as to justifying the exemption on grounds of capital investment required. Finally, as a result of its Ruling 1975-12, the FEA is now requiring the producers to reimburse substantial sums of money, in at least one instance an amount in excess of $500,000.00.

Additionally, the FEA application of Ruling 1975-12 would seem to mandate inconsistent results. Assume the case where there exists a well casing penetrating through three distinct oil producing formations, each of which have been shown to have an average daily production of crude oil of four barrels. If the well is completed as a multiple completion well, Rule 1975-12 will permit all twelve barrels recovered per day to be sold at the unregulated price. However, if the well is completed as a commingled well, Ruling 1975-12, as applied here, prohibits the sale of any of the crude oil recovered at the unregulated price. Inconsistencies of this sort are the kinds of situations that the notice requirements of the Administrative Procedure Act sought to avoid by mandating full and informed agency action.

Accordingly, the court concludes that section three of Federal Energy Administration Ruling 1975-12 is void for lack of proper agency procedures and consideration for its adoption.

Bases of Decision of the District Court

From the foregoing quotation it is apparent that the district court held that Ruling 1975-12, admittedly adopted without the notice and comment procedures of the APA, § 553(b) and (c), Title 5 U.S.C., was invalid because:

(1) Part III of Ruling 1975-12 was not an interpretative ruling because an interpretative rule "cannot be

more than an internal agency 'housekeeping' arrangement"; and

(2) § 7(i) of the Federal Energy Administration Act (FEAA) (P.L. 93-275, 88 Stat. 96, formerly § 766(i), Title 15 U.S.C., repealed by P.L. 95-91, 91 Stat. 565] required notice and comment procedures prior to its issuance even if Part III of Ruling 1975-12 is an interpretative rule, because it was likely to have a "substantial impact" on either the national economy or a large number of individuals or businesses.

Contentions of Appellee In Support of Decision of the District Court

In its brief, appellee expands the bases of the decision expressed by the district court, by contending that the judgment should be affirmed on the merits for the following reasons:

I. Ruling 1975-12 (Part III) is a substantive (legislative) ruling, requiring the notice and comment provisions of the APA and FEAA because:

A. Ruling 1975-12 (Part III) was neither required nor compelled by existing regulations;

B. There was no contemporaneous construction of Ruling 1975-12 (Part III);

C. Ruling 1975-12 (Part III) either expanded existing regulations or constricted existing regulations;

D. Ruling 1975-12 (Part III) is the sole legal authority for all multiple zone production as it relates to the stripper well lease amendment;

E. Ruling 1975-12 (Part III) had substantial impact and is therefore invalid for failure to

comply with notice and comment procedures; and

F. Failure of FEA to comply with notice and comment procedures resulted in a ruling which is not based on substantial evidence, and which is arbitrary and capricious.

Challenge to Jurisdiction of This Appeal by Appellee

In point II of its brief, appellee contends that this Court "has no jurisdiction over this appeal" because this appeal does not arise under the Economic Stabilization Act of 1970 (ESA), § 1904 note, Title 12 U.S.C., or the Emergency Petroleum Allocation Act (EPAA), §§ 751 *et seq.*, Title 15 U.S.C.

This contention was made earlier in a motion of appelee to dismiss the appeal, submitted on briefs before oral argument. The motion to dismiss was denied. Nevertheless, the contention is resubmitted by appellee.

Contentions of Appellant DOE

As successor to FEA, DOE contends that the judgment of the district court was erroneous and should be reversed because:

A. Ruling 1975-12 (Part III) is an interpretative ruling and is therefore exempt from the rule-making requirements of the APA; and

B. The court below applied an erroneous definition of an interpretative rule.

Questions Presented

The initial question presented is whether this Court should reconsider and vacate its order denying the motion of appellee to dismiss the appeal for lack of jurisdiction.

The question on the merits presented on this appeal is whether Ruling 1975-12 (Part III) is an "interpretative ruling" and therefore exempt from the rule making notice and comment requirements of the APA, § 553(b) and (c), Title 5 U.S.C. and of § 7(i) of the FEAA [now repealed, formerly § 766(i), Title 15 U.S.C.].

Decision on Appeal

For reasons stated hereinafter, we reaffirm our jurisdiction of this appeal and reverse the judgment of the district court.

I.

Jurisdiction of TECA

After reconsideration, the earlier order denying the motion of appellee to dismiss this appeal is affirmed. In support of its motion appellee contends that the issues on this appeal arise under the APA rather than the EPAA. The issues on this appeal arise under the EPAA. The appeal is based upon alleged error of the FEA in failing to comply with the prior notice and comment requirements of the original § 4 of the APA, codified as § 553(b) and (c), Title 5 U.S.C., "as amplified by the Federal Energy Administration Act," §§ 761 *et seq.*, Title 15 U.S.C. Judge Johnson of this Court has recently stated the rule as follows:

> But as this court plainly stated in *Standard Oil* . . . "Section 4 of the APA was incorporated by reference in Section 5(a) (1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a) (1)." An issue arising under the APA is not a collateral issue, then, but, by virtue of Section 5(a) (1) of the EPAA an issue arising under the EPAA itself [*Texaco, Inc.* v. *Department of Energy* (TECA 1979) —— F.2d ——, note 4, at 9 (Nos. D.C.-52, 53 and 54, October 15, 1979)].

In accord is the earlier ruling in *Standard Oil Co.* v. *Department of Energy* (TECA 1978) 596 F.2d 1029, 1.c.

1056, the source of the quotation in the excerpt from the *Texaco, Inc.* case, *supra.* That this Court has exclusive jurisdiction of appeals from final decisions by district courts on issues arising under the EPAA is not controverted.

II.

Part III of Ruling 1975-12 Was Interpretative And Exempt From the Notice and Comment Requirements of the APA and FEAA

The first reason given by the district court for holding that Part III of Ruling 1975-12 was "void," was the novel conclusion that, under the APA, an interpretative rule cannot be more than "an internal agency 'housekeeping' arrangement." No judicial or statutory authority in support of this proposition is cited by the district court or the appellee. The portion of the legislative history of the APA relied on by the district court, and quoted above, does not support the conclusion of the district court, which is contrary to the plain wording of the exemption of § 553(b)(3)(A) of the APA and the overwhelming case law including cases cited in briefs of both parties on the definitions and identification of interpretative and legislative administrative rules.

The second reason given by the district court for its holding that Part III of Ruling 1975-12 was "void" was that, even if it is an interpretative ruling, notice and comment procedures are required by § 7(i) of the FEAA [now repealed, formerly § 766(i), Title 15 U.S.C.] because the ruling would have a "substantial impact" on either the national economy or large numbers of individuals or businesses. This conclusion is directly contrary to the express provisions of § 7(i) of the FEAA which subparagraph expressly makes it applicable to rules as defined in the APA at § 551(4), Title 5 U.S.C., and no other rules.

Interpretative rules, interpreting an existing statute or existing legislative regulation, or both, are not within the

definition of § 551(4) of the APA because interpretative rules do not have future effect as that term is used in § 551(4), and are not binding on the courts. *Energy Reserves Group, Inc.* v. *Department of Energy, supra,* (TECA (1978) 589 F.2d at 1100.

Interpretative rules do not have primarily a future effect, as do legislative rules, to be applied prospectively only. The effect of Part III of Ruling 1975-12 is retroactive, as the appellee complains, as well as current and prospective. *American Express Co.* v. *United States* (C.C.P.A. 1973) 472 F.2d 1050; 3 B. Mezines, J. Stein & J. Gruff, *Administrative Law Treatise* § 18.02[5] (1979 & Supp. 1979).

In the *American Express Co.* case, *supra,* after quoting the provisions of § 551(4) of the APA, the court made it clear that § 551(4) defined legislative rules primarily concerned with the future rather than evaluation of past conduct, stating:

> These definitions per se do not clearly establish whether the Secretary's activities in connection with a countervailing duty determination under section 303 would constitute rule making or an adjudication pursuant to an order if the APA is assumed to be applicable to section 303 investigations. However, resort to other sources, including Administrative Procedure Act, Legislative History, 79th Congress 1944-46 (hereinafter *History)* and Attorney General's Manual on the Administrative Procedure Act, 1947 (hereinafter *Manual)* helps resolve the question. Thus, it is indicated that rule making is legislative in nature (*History,* pp. 193, 251, 353; *Manual,* pg. 14), is primarily concerned with policy considerations for the future rather than the evaluation of past conduct (*History,* pg. 355; *Manual,* pg. 14), and looks not to the evidentiary facts but to the policy-making conclusions to be drawn from the facts (*Manual,* pg. 14). On the other hand, adjudication is judicial rather than legislative in nature (*His-*

tory, pp. 193, 251, 353, 355), has an accusatory flavor and may result in some form of disciplinary action (*History*, pp. 353, 408; *Manual*, pg. 14), and is concerned with issues of fact under stated law (*History*, pg. 353; *Manual*, pp. 14-15). (*American Express Co.* v. *United States, supra*, (C.C.P.A. 1973) 472 F.2d at 1055).

This definition excludes an interpretative rule which may have some effect and "-it would be frivolous if it did not-". *British Caledonian Airways, Ltd.* v. *C.A.B.* (C.A.D.C. 1978) 584 F.2d 982, 1.c. 990.

So if Part III of Ruling 1975-12 is an interpretative rule, neither reason given by the district court for holding it invalid is legally sound.

We conclude that Part III of Ruling 1975-12 is an interpretative rule, and that the judgment of the district court must be reversed.

In the field of federal administrative law and within the meaning of the APA, an interpretative rule is one that in form and substance interprets (1) a statute, (2) a legislative rule, (3) another interpretative rule, (4) judicial decisions, (5) administrative decisions, (6) administrative rulings, (7) any other law or interpretations, (8) any combination of the above, or (9) nothing. 1 K. Davis, *Administrative Law Treatise* § 5.03, at 304 (1st ed. 1958); 2 K. Davis, *Administrative Law Treatise* § 7.8, at 36-43 (2d ed. 1979); *Gibson Wine Co.* v. *Snyder* (C.A. D.C. 1952) 194 F.2d 329; *Energy Reserves Group, Inc.* v. *Department of Energy, supra*, (TECA 1978) 589 F.2d at 1092. The definition in the district court decision failed to recognize this established meaning of the term "interpretative rule."

Because Part III of Ruling 1975-12 was an interpretation of the existing statutory stripper well exemption and of the legislative regulation issued pursuant thereto, it is an interpretative rule which is not binding on the courts, has

no future effect and therefore is exempt from the notice and comment procedures of the APA, § 553(b) and (c), Title 5 U.S.C., and § 7(i) of the FEAA. *Energy Reserves Group, Inc.* v. *Department of Energy, supra,* (TECA 1978) 589 F.2d 1082, explained in *Duncan* v. *Theis, supra,* (TECA 1979) —— F.2d —— (No. 10-22, December 27, 1979).

This leaves the question whether for reasons not relied on by the district court, but submitted by appellee, Part III of Ruling 1975-12 is legislative rather than interpretative. If it is not interpretative, it is not exempt from the notice and comment requirements of the APA, § 553 (b) and (c), Title 5 U.S.C., and possibly of § 7(i) of the FEAA. It is concluded that no other such reason, or reasons, exist that support or require the conclusion that Part III of Ruling 1975-12 is not an interpretative rule.

Appellee relies on several unrecognized tests to support its contention that Part III of Ruling 1975-12 is legislative rather than interpretative.

Contention A of appellee, quoted above, relies on a supposed test, that the rule was "neither required nor compelled."

The authorities cited in support of this supposed test do not support its existence. They include *Energy Reserves Group, Inc.* v. *Department of Energy, supra,* (TECA 1978) 589 F.2d 1082, which is directly in conflict with this contention of the appellee.

In contention B, *supra,* appellee asserts a supposed "contemporaneous construction" test. Whatever that test may be, if it exists, it has no application to the issues in this appeal.

The expansion or constriction test, relied on by appellee in contention C, if it exists in any form, is inapplicable, because Part III of Ruling 1975-12 did not in form or substance purport to expand or restrict the underlying statute and regulation defining the "stripper well" exemption. It

interpreted them. The assertion that DOE argued earlier that it expanded the number of wells to be exempted by the stripper well definition, is based on an unsound assumption that the rule was legislative in nature and changed the scope of the underlying statute and regulation.

In contention D, the sole legal authority contention, appellee relies on inapposite authority which relates to a legislative rule. The contention ignores the fact that Part III of Ruling 1975-12 in form and substance is an interpretation of the legally controlling statute and regulation.

The contention lettered E of appellee, that Part III of Ruling 1975-12 was a legislative rule and requires prior notice and comment because it had "substantial impact" is unsound for the reasons stated in the opinion in the *Energy Reserves Group, Inc.* case, *supra,* (TECA 1978) 589 F.2d 1082, and authorities therein cited, including *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). Notwithstanding the view of Judge Christensen that in some contexts a "substantial impact test" may bear upon whether a rule is interpretative or legislative, see *Energy Reserves Group, Inc., supra,* (TECA 1978) 589 F.2d at 1102-03 (Christensen, J., concurring), he agrees that no such test on the facts of this case would render Part III of Ruling 1975-12 anything other than interpretative within the contemplation of the APA.

The "informed reflection" test enunciated in contention F of appellee, quoted above, is another way of stating that the prior notice and comment requirements are applicable to legislative rules. The underlying stripper well statute and regulation used the word "wells" which was interpreted by Part III of Ruling 1975-12. So appellee is in error in contending that the "action at issue is not mentioned explicitly or implicitly in the ruling being challenged." (Appellee's Brief, 20.)

Contention F, that Part III of Ruling 1975-12 is not based on substantial evidence, because of failure to comply with the notice and comment procedures is based on the erroneous assumption that it is legislative rather than an interpretative rule. The contention that it is arbitrary and capricious is without merit, because, as pointed out hereinafter, Part III of Ruling 1975-12 has a rational basis and is a reasonable interpretation of the statutory stripper well exemption and stripper well regulation adopted pursuant to statutory authority.

Appellee contended that Part III of Ruling 1975-12 was invalid because it was retroactive in effect, or at least should not be applied retroactively. These contentions are lacking in merit because the stripper well statute and regulation are the basis of the challenged action by FEA, not the interpretative rule. *Energy Reserves Group, Inc.* v. *Department of Energy, supra,* (TECA 1978) 589 F.2d at 1098.

Appellee contended in the district court that Part III of Ruling 1975-12 was arbitrary and capricious. That contention has been impliedly rejected in the conclusion that it was a reasonable interpretative rule with a rational basis.

Appellee sought no formal opinion on its claim in this action, but appellee offered evidence that, on oral inquiry for guidance, appellee and some of its concerned members had been referred to state practice in counting commingled wells. Oklahoma had no parallel practice or problem. Nevertheless, in the only proven Oklahoma rule of practice conceivably relevant in the issuing of state "allowables" (allowances to produce crude oil), only one allowable was issued for commingled wells, while two allowables were issued for multiple completion wells. (Tr. 385.) It is questionable whether this evidence should be accorded any weight, but to the extent that it should, the evidence supports the appellant DOE rather than appellee.

Appellee further contends that Part III of Ruling 1975-12 violates the Fifth Amendment to the Constitution of

the United States by depriving members of the appellee of due process of law. This contention is lacking in legal substance. *Mapco Inc.* v. *Carter* (TECA 1978) 573 F.2d 1268, 1.c. 1280-83. In this connection attention is invited to the provision of 10 C.F.R. § 205.50 permitting application for relief by members of appellee from serious hardship or gross inequity.

Part III of Ruling 1975-12 is in form and substance an interpretation of the preexisting "stripper well" statutory exemption and the preexisting regulation promulgated pursuant to the statutory authorization and mandate. It is purported to interpret, and did interpret, what in the opinion of the General Counsel for FEA, the statutory exemption and regulation always meant in the use of the term "well." Neither in form or substance did it expand or contract the meaning of the term "well" as used in the statute on [*sic*] regulation.

In summary, while the designation of Part III of Ruling 1975-12 as an interpretative rule by the FEA is not binding on the courts, an examination of the material statute, the legislative history, the regulation, and the rule demonstrates that it is interpretative, and expressly exempt from the notice and comment procedures of the APA, § 553(b) and (c), Title 5 U.S.C. This conclusion is supported by an opinion of this Court not available to the district court when its decision was rendered. See *Energy Reserves Group, Inc.* v. *Department of Energy, supra,* (TECA 1978) 589 F.2d 1082, explained in *Duncan* v. *Theis, supra,* (TECA 1979) —— F.2d —— (No. 10-22, December 27, 1979).

Reversal of Decision of District Court And Direction of Entry of Judgment Affirming The Validity of Applications of Part III of Ruling 1975-12

Before the trial, the district court fully defined all the issues in the action below in a comprehensive pretrial order. (Tr. 23-33).

A plenary evidentiary trial was held by the district court on all controverted issues, which were fully briefed. (Tr. 284-536); Exhibits 537-789; Confidential Data Volume II A.) Under these circumstances, if the record is sufficient for a final decision, there is no reason to remand the action for further proceedings. We find the record to be sufficient for final decision on the litigated issues, and uphold the action of FEA (and its successor DOE), applying Part III of interpretative Ruling 1975-12. In so doing we recognize that the interpretation of the underlying stripper well statutory exemption and regulation is not binding on this Court. *Energy Reserves Group, Inc.* v. *Department of Energy, supra,* (TECA 1978) 589 F.2d at 1093; 2 K. Davis, *Administrative Law Treatise* § 7.8, at 36-38 and § 7.13, at 59-64 (2d ed. 1979).

In determining whether there was a rational basis for the actions of the FEA in applying Part III of Ruling 1975-12 to commingled wells, the fundamental consideration is whether the statutory provision and the legislative regulation defining the stripper well exemption authorized or permitted the actions of FEA in defining the term "well" in the stripper well exemption to forbid a commingled well to be more than one well. We are satisfied that Part III of Ruling 1975-12 was authorized and permitted by the underlying statutory provision and regulation. The definition in Part III of the interpretative ruling was not arbitrary or capricious. A rational basis existed for its adoption and was enunciated in the ruling. It was based on the similarities of multiple completition wells to two or more separate wells in isolating crude oil from each formation in separate tubing strings until it reaches the surface, maintenance of quality differences, additional capital expense and maintenance expense not required in commingled wells.

Commingled wells do not have these characteristics. The facts relied on for the basis of Part III of Ruling 1975-12 are supported by the evidence received in the trial by the district court.

In the House-Senate Conference Report on the original stripper well statutory exemption in the Trans-Alaska Pipeline Authorization Act (TAPAA), P.L. 93-153, 87 Stat. 576, Congress enjoined the administering agency that its regulations to be promulgated,

> shall be so designed as to provide safeguards against any abuse, overreaching or altering of normal patterns of operations to achieve a benefit under this section which would not otherwise be available. Congress specifically intends that the regulations shall, among other things, prevent any "gerrymandering" of leases to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings. (Footnote omitted.) [*Energy Reserves Group, Inc.* v. *Department of Energy, supra,* (TECA 1978) 589 F.2d at 1109-10, quoting Conf. Rep. No. 93-624, 93d Cong., 1st Sess., *reprinted in* (1973) U.S. Code Cong. & Ad. News 2523, 1.c. 2532.]

An interpretation of the statute and regulation was required on the method of counting of commingled wells. The interpretation in the challenged ruling was a reasonable choice of possible interpretations by the responsible administrative agency. It is not required that the interpretation be the only reasonable choice. *Udall* v. *Tallman,* 380 U.S. 1, 1.c. 4, 85 S.Ct. 792, 1.c. 795, 13 L.Ed.2d 616, 1.c. 619 (1965), *Fulman* v. *United States,* 434 U.S. 528, 1.c. 536, 98 S.Ct. 841, 1.c. 846, 55 L.Ed.2d 1, 1.c. 10 (1978).

In the absence of exceptional adverse circumstances this Court should defer to a reasonable exercise of expertise expressed in an interpretative rule by an administrative agency. 2 K. Davis, *Administrative Law Treatise, supra,* § 7.13, at 58-64 (2d ed. 1979); *Udall* v. *Tallman, supra,* 380 U.S. at 4, 85 S.Ct. at 795, 13 L.Ed.2d at 619 (1965); *Fulman* v. *United States, supra,* 434 U.S. at 536, 98 S.Ct. at 846, 55 L.Ed.2d at 10 (1978). This Court has recognized and applied this rule of deference in *Southern Union Produc-*

tion Company v. *Federal Energy Administration* (TECA 1978) 569 F.2d 1147, 1.c. 1152; *Marathon Oil Co.* v. *Federal Energy Administration* (TECA 1976) 547 F.2d 1140, *cert. denied,* 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 378 (1977); *University of Southern California* v. *Cost of Living Council* (TECA 1972) 472 F.2d 1065, 1.c. 1068-69; among many other cases.

In determining whether to defer to a reasonable interpretation of a statute, a regulation, or both, courts give extra authoritative weight to interpretative rules (1) which are made contemporaneously with the enactment of the statute, (2) which have been followed consistently over a long period, or (3) which were outstanding at the time of its reenactment. These three factors operate separately or in any combination. 2 K. Davis, *Administrative Law Treatise* § 7.14, at 64 (2d ed. 1979). Two of the three factors, (2) consistent application and (3) interpretation outstanding at the time of its reenactment, are present in this record of the history of Part III of Ruling 1975-12.

In the portion of its brief quoted hereinabove, appellee concedes the consistency of application of the challenged interpretation. This element of consistency, among other facts, distinguishes this case from *Standard Oil Co.* v. *Department of Energy* (TECA 1978) 596 F.2d 1029, relied upon by appellee.

Further, Part III of Ruling 1975-12 was outstanding on August 14, 1976, when the stripper well exemption was reenacted by § 121 of the Energy Conservation and Production Act of 1976, P.L. 94-385, 90 Stat. 1125, by amending the EPAA, 15 U.S.C. § 757(i). (The stripper well statutory exemption in force on August 29, 1975, when Ruling 1975-12 was issued had been repealed on December 22, 1975, by § 401 of the Energy Policy and Conservation Act of 1975, P.L. 94-163, 89 Stat. 871.) Reenactment of an underlying statutory provision, in substantially the same language, when an interpretative rule was outstanding has been rec-

ognized as a strong reason for deference to an interpretative rule defining the stripper well exemption by this Court in the *Southern Union Production Company* case, *supra,* (TECA 1978) 569 F.2d 1147 and in the *Energy Reserves Group, Inc.* case, *supra,* (TECA 1978) 589 F.2d 1082. We follow those cases on this appeal.

It is true that Part III of Ruling 1975-12 was not issued contemporaneously with the enactment of the stripper well exemption in the TAPAA or the EPAA in 1973. There is an interval of more than one year between the enactment of the EPAA and the issuance of Ruling 1975-12. However, deference should not be withheld on this ground when all other circumstances are favorable to deference by this Court.

In summary it is concluded that Part III of 1975-12 was and is a valid interpretative rule entitled to deference by the courts, in interpreting the statutory stripper well exemption and regulations.

The questions that we have decided up to this point, and the questions challenging Part III of Ruling 1975-12 submitted to the district court by the parties below are questions of law arising from the challenges of the appellee to the validity of Part III of Ruling 1975-12 as a proper interpretation of the underlying statutory stripper well exemption and the legislative regulation defining the statutory stripper well exemption.

Appellee undertook in the district court to offer oral and documentary evidence designed to transform the issues to issues of fact or mixed issues of fact and law. So far as the evidence exceeded that admissible on the issue of standing, on the uncontroverted factual industrial background desirable to an understanding of the meaning of the challenged rule, and on the effect of Part III of Ruling 1975-12 on a segment of the petroleum industry, it was largely immaterial to a decision on the legality of appli-

cation of Part III of Ruling 1975-12 to members of the appellee producing crude oil from commingled wells.

Because the parties have been afforded a fair plenary evidentiary trial in the district court, the record is sufficient for a final decision. Therefore, for the reasons stated above, it is hereby

ORDERED that the judgment of the district court be, and it is hereby, reversed and remanded with directions. It is further

ORDERED that the district court be, and it is hereby, directed to enter judgment in favor of the defendant Department of Energy declaring that Part III of Ruling 1975-12, and its application to exclude counting of commingled wells as two or more wells, in applying the statutory stripper well exemption and regulations, is lawful and effective. It is further

ORDERED that the district court shall enter such other orders and judgments necessary or desirable to make restitution for the effects of orders of the district court and of the judgment of the district court heretofore entered which are inconsistent with this opinion and these orders.

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 10-21

ENERGY CONSUMERS AND PRODUCERS ASSOCIATION, INC.,
Plaintiff-Appellee,

v.

DEPARTMENT OF ENERGY,
Defendant-Appellant.

BEFORE TECA COURT

Upon consideration of Appellee Energy Consumers and Producers Association, Inc.'s Petition for Rehearing *en banc*, it is ORDERED that said Petition is DENIED. The mandate will issue on May 6, 1980.

FOR THE COURT:

Ruth H. Jacobson
Clerk

by: (s) *Michael S. Levine*
Michael S. Levine
Deputy Clerk

April 28, 1980

[APPENDIX]

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Oct. 23, 1979]

OKLAHOMA ASSOCIATION OF ENERGY CONSUMERS AND PRODUCERS, a non-profit corporation, Plaintiff-Appellant,	)	
vs.	)	NO. 79-1847
FEDERAL ENERGY ADMINISTRATION OF THE UNITED STATES, Defendant-Appellee.	)	

Appeal From the United States District Court
For the Eastern District of Oklahoma
(D.C. No. 76-366-C)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Richard L. Bohanon, Bohanon & Barth, Oklahoma City, Oklahoma, Fred A. Gipson, Seminole, Oklahoma, and Richard S. Roberts, Wewoka, Oklahoma, for Plaintiff-Appellant.

Betty Outhier Williams, Assistant United States Attorney, Muskogee, Oklahoma, Leonard Schaitman and Dina R. Lassow, Civil Division, Department of Justice, Washington, D.C., for Defendant-Appellee.

Before SETH, Chief Judge, PICKETT and McWILLIAMS, Circuit Judges.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that

oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). This cause is therefore submitted without oral argument.

This matter comes on for consideration of appellee's motion to dismiss the captioned appeal for lack of jurisdiction.

The case arose in the United States District Court for the Eastern District of Oklahoma as a challenge to a certain regulation promulgated by the Federal Energy Administration (FEA) and an interpretation of one of its rules. In ruling on the merits, the trial court entered a two-part judgment:

1. Declaring § 3 of FEA ruling 1975-12 invalid (for failure of the agency to comply with the proper APA procedures), and
2. Holding that an unwritten bonus offer is not to be used by the FEA in calculating the ceiling price of crude oil.

Appellant Oklahoma Association of Energy Consumers and Producers (Association) filed a timely notice of appeal to this court from the second part of the above judgment. Simultaneously, defendant-appellee (FEA) filed a notice of appeal with respect to the invalidation of its regulation (part one above) in the Temporary Emergency Court of Appeals (TECA).

The FEA has moved to dismiss this appeal for lack of jurisdiction, contending the TECA has exclusive jurisdiction. Appellant Association filed a similar motion in the TECA with respect to the FEA's appeal in that court, which we have been advised was denied on September 18, 1979.

The Association argues in favor of this court's jurisdiction by stating the issue as being whether the FEA (also referred to as DOE) followed proper APA procedures in

promulgating its regulation defining "posted price." Thus the Association would treat this case as a simple appeal of a district court's judgment declaring an agency's action proper.

The district court in its pre-trial order stated:

> To the extent this Court has jurisdiction over this matter, jurisdiction is based on Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. which incorporates by reference Section 211 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. Section 1904. Plaintiff contends that jurisdiction also arises under the Federal Energy Administration Act ("FEAA"), 15 U.S.C. Section 766.

The FEAA provided a successor agency, which incorporated the Federal Energy Office and parts of other agency functions to form one agency. This incorporation thus automatically included the provisions of the 1970 Economic Stabilization Act, 12 U.S.C. § 1904, et seq., and the creation of the TECA. *See* M. Spiegel & Sons Oil Corp. v. B. P. Oil Corp., 531 F.2d 669 (2nd Cir. 1976); Newell v. Federal Energy Administration, 591 F.2d 704, 706, n.3 (Em. App. 1979). Thus under either of the jurisdictional bases stated by the trial court the provisions of the Economic Stabilization Act are applicable.

In Bray v. United States, 423 U.S. 73, 74 (1975) the Supreme Court held that the TECA was vested with the exclusive jurisdiction of all appeals from the district courts of the United States arising under the Economic Stabilization Act or under regulations or orders issued thereunder. 12 U.S.C. § 1904 Note, § 211(b)(2). Thus it is exactly the types of regulations on oil and gas pricing here presented that the TECA was established to handle. Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 99 S.Ct. 2182 (1979). *See also* V.V. Car Wash, Inc. v. Mobil Oil Corporation, Unpublished No. 77-1313 (10th Cir. filed December 27, 1977) (distinguishing "arising un-

der" jurisdiction from court's decision in McCulloch Gas Processing Corp. v. Black Hills Oil Marketers, Inc., 564 F.2d 916 [10th Cir. 1977]); Withington v. Federal Energy Administration, Unpublished No. 76-1612 (10th Cir. filed August 25, 1976) (challenge to FEA regulations on "old" and "new" oil pricing).

This appeal clearly involves "(1) a challenge to the FEA's interpretation of the regulations, and (2) a challenge to the procedures followed by the FEA in adopting certain of the regulations." Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1039 (Em. App. 1978). *See also* Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082 (Em. App. 1978) (appeal from District of Kansas on DOE interpretation of "stripper wells"); Sohio Petroleum Co. v. Caribou Four Corners, 573 F.2d 1259, 1262-1263 (appeal from District of Wyoming on stripper well exemption) (Em. App. 1978); Shell Oil Co. v. Federal Energy Administration, 574 F.2d 512 (Em. App. 1978) (challenge to FEA rulemaking procedure on pricing unleaded gasoline); Grigsby v. Department of Energy, 585 F.2d 1069 (Em. App. 1978), *cert. denied*, 99 S.Ct. 1216 (1979) (challenge to FEA regulations concerning similar issue on "posted price"); National Helium Corp. v. Federal Energy Administration, 569 F.2d 1137 (Em. App. 1977) (interpretation of FEA's rules under APA); M. Spiegel & Sons Oil Corp. v. B. P. Oil Corp., *supra.*

The Second Circuit has recently discussed the jurisdictional boundaries of the TECA and concluded that case law indicates that the TECA has more of an "issue" type of jurisdiction than a strict "arising under" jurisdiction. Part of the court's reasoning is based on the fact that it is possible to take a bifurcated appeal to both a circuit court and to the TECA from the same district court judgment. *See* Coastal States Marketing, Inc. v. New England Petroleum Corp., ____ F.2d ____, No. 79-7330 (2nd Cir. filed August 1, 1979). There is little to be gained, however, other than mass confusion, by the promoting of simultaneous cir-

cuit court-TECA appeals. *Compare* Associated General Contractors of America, Inc., Etc. v. Laborers' International Union of North America, Local 612, 476 F.2d 1388 (Em. App. 1973) *with* Gordon v. Laborers' International Union of North America 490 F.2d 133 (10th Cir. 1973), *cert. denied*, 419 U.S. 836 (1974).

In the case at bar even under the traditional "arising under" concept of jurisdiction, the instant appeal belongs in the Temporary Emergency Court. The FEA, by virtue of its authority under the various energy acts, has determined that the fifteen-cent bonus for long term contracts cannot be included as part of the posted price. It is clear that the "contract law" allegations are not separable from the federal acts and regulations concerning the issue of posted price. Mountain Fuel Supply Co. v. Johnson, *supra*, 586 F.2d at 1384.

Appellee's motion to dismiss is granted and the appeal is dismissed for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed June 29, 1979]

OKLAHOMA ASSOCIATION OF ENERGY CONSUMERS AND PRODUCERS, Plaintiff,	)	
-vs-	)	No. 76-366-C
FEDERAL ENERGY ADMINISTRATION OF THE UNITED STATES, Defendant.	)	

MEMORANDUM OPINION

Plaintiff Oklahoma Association of Energy Consumers and Producers (OAECP) is a non-profit corporation organized under the laws of the State of Oklahoma for the stated purpose of benefiting Oklahoma producers and consumers of energy. Defendant Federal Energy Administration (FEA) is an agency of the United States created pursuant to the Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761-787. Plaintiff instituted this action seeking declaratory judgment and injunctive relief invalidating two separate and distinct rulings and regulations of the FEA, one in which the FEA requires a well producing crude oil from more than one formation to produce the crude oil through a separate tubing string inside the well casing for each producing formation that is tapped in order for the well, or the production of the separate formations, to qualify for the stripper well exemption. The second agency action complained of is a determination that the highest posted price for crude oil used to determine the ceiling price of the oil does not include an unwritten bonus for term contracts of sale over and above the publicly circulated written offer to purchase.

On March 16 and 17, 1978 proceedings were conducted before the Honorable Joseph W. Morris on the issues pre-

sented by the complaint. Judge Morris resigned from the bench prior to a determination of this action, and the parties agreed to submit the matter to the court for resolution on the basis of the transcript of the trial before Judge Morris.

1. *Oil Production.*

Section 4(e)(2) of the Emergency Petroleum Allocation Act (EPAA), Pub.L. 93-159, provided:

> (A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.
>
> (B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.
>
> (C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

Pursuant to this statutory requirement FEA promulgated an exemption from the mandatory petroleum allocation and price regulations for the first sale of crude oil and condensates produced in the United States from any property whose average daily production of crude oil and condensate did not exceed 10 barrels per well. 10 C.F.R. § 210.32. On August 29, 1975 FEA promulgated and adopted Ruling 1975-12, without public proceedings, for the stated purpose of setting forth "the guidelines to be applied in those cases where production from a property for which the stripper well lease exemption is claimed appears not to have been maintained at the maximum feasible rate of production or to have been significantly curtailed." The substance of Rul-

ing 1975-12 dealt with four distinct issues: (1) Stripper well lease production requirements; (2) Adjustments for significantly curtailed or disrupted production; (3) Multiple completion wells; and (4) Enforcement. In regard to multiple completion wells, Ruling 1975-12 stated:

> III. *Multiple Completion Wells.* — Where a property encompasses the right to produce crude oil from two or more producing formations or reservoirs, producers sometimes utilize a production technique involving "multiple completion wells." This technique, which makes use of an existing well that produces from one formation, involves drilling from the existing casing separate well-bores or elongating existing well-bores in order to reach other formations. By the installation of additional tubing strings, crude oil may in this manner be produced concurrently from two or more formations. A multiple completion well is to be distinguished from a "recompleted well" which involves the technique of drilling a separate well-bore from an existing casing in order to reach the same reservoir, or redrilling the same well-bore to reach a new reservoir after production from the original reservoir has been abandoned. While a multiple completion well involves the simultaneous production from two or more reservoirs, a recompleted well involves production from only one formation.
>
> Thus, a multiple completion well is designed to accomplish the same task as two or more separate and distinct producing wells, although conserving initial capital outlay, it functions in many ways as two or more separate producing wells: Crude oil from each formation remains isolated in distinct tubing strings until reaching the surface, where it may either be commingled with crude oil from other formations, or may continue to be diverted separately through alternative chokes and valves in the wellhead "Christmas tree" fitting. In this way, differences in API gravity, sul-

phur content and mineral impurities that might be characteristic of different formations, can be maintained.

Although a multiple completion well is a somewhat less costly alternative to drilling an entirely separate well in order to reach another producing formation in the field, it nevertheless represents a significant capital investment and poses certain additional problems beyond those encountered with single or separate wells. For example, the artificial lift in a multiple completion well is more complicated and, correspondingly more costly to install. Furthermore, repairs to any of the intervals are more costly than in separate wells and can result in a temporary shut-down of production from all reservoirs.

Therefore, the FEA has determined that multiple completion wells may be considered as two (or more) wells for the purpose of calculating "average daily production" pursuant to the stripper well lease exemption of 10 CFR 210.32 if:

(a) The well consists of two (or more) separate tubing strings run inside the casing, each of which carries crude oil from a separate and distinct producing formation, and

(b) the production capabilities of each formation are unaffected by any change in the production level of any other formation producing through the same well. This result is consistent with the congressional policy of increasing the incentive and economic feasibility of maintaining production of crude oil from stripper well leases through advanced production techniques.

OAECP alleges that Ruling 1975-12 as applied to commingled wells is arbitrary and capricious. Further, OAECP alleges that the rule was improperly adopted by the FEA and is void. FEA contends that Ruling 1975-12 is an inter-

pretive rule and, as such, is not subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553.

A multiple completion well produces crude oil from several oil bearing formations by utilizing a common well casing while segregating the oil produced from each formation into a separate tubing string. A commingled well is similar to a multiple completion well in that it also produces crude oil from two or more oil bearing formations through a common well casing. However, a commingled well does not segregate the oil from each formation but produces the oil from the several formations through a single tubing string. Thus the crude oil from any single oil producing formation is mixed with the crude oil from all other oil producing formations which have been tapped through the common well casing.

Several of the members of OAECP are engaged in the production of crude oil through the utilization of commingled wells in which one or more of the oil producing formations produced less than ten barrels per day at the time the well was completed as a commingled well. However, now that the well is being operated as a commingled well, the amount of crude oil produced through the well from all of the oil producing formations which have been tapped through the common well casing totals in excess of ten barrels per day. These members have previously sold the oil produced, or portions of it, at the unregulated market price in the belief that if one of the oil producing formations in the commingled well was producing a certain amount of oil at the time the formations were commingled, and the amount of oil produced from that formation would qualify a single completion well as a stripper well, the amount of oil produced from that formation in a commingled well would also qualify for stripper well status. FEA disagreed. FEA adopted the position that it is not possible to accurately determine in a commingled well how much oil is being produced from a formation at any given

time while such determination is readily made in a multiple completion well. In adopting this position, FEA determined that commingled wells would not qualify for consideration as two (or more) wells for the purpose of calculating average daily production under the stripper well lease exemption. As a result, FEA cited members of OAECP for selling crude oil at a price in excess of the ceiling price and issued remedial orders requiring those members to make reimbursement for alleged overcharges.

In 1946, Congress passed the Administrative Procedure Act, Pub.L. 79-404, 60 Stat. 237. As originally enacted, the rulemaking portion of the Administrative Procedure Act (APA) stated in part:

RULE MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts —

(a) NOTICE. — General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding in a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The APA survived essentially unchanged until September 6, 1966 when Congress codified the general and permanent laws relating to the organization of the government as Title 5 United States Code. At that time, the APA became Chapter 5 of Title 5, and Section 4, quoted above, became codified as 5 U.S.C. § 553 as follows:

§ 553. Rule making.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

By comparing Section 4 of the APA with 5 U.S.C. § 553, it is readily apparent that any changes of substantive law that have occurred during the process of codification, at least so far as the above quoted provisions are concerned, are minimal. Therefore, for a proper understanding of the intent of Congress in enacting section 4 of the APA and its successor, 5 U.S.C. § 553, it is appropriate to look to legislative reports that originally accompanied the APA. Such a report is the legislative history of the APA contained in House Report No. 1980 by the House Committee on the Judiciary dated May 3, 1946 *reprinted in* (1946) U.S. Code Cong. Serv. 1195. This report begins with a discussion of the recognized importance of the legislation by stating:

> For more than 10 years this legislation has been under consideration. Certainly no measure of like character has had the painstaking and detailed study and drafting. Both the legislative and executive branches have participated, and private interests of every kind have had an opportunity to present their views. In the legislative branch there have been four major proposals for the creation of an administrative court, and at least eight for the regulation of administrative procedure. Two important studies were conducted in the executive branch under the late President Franklin D. Roosevelt — each resulting in reports to Congress with legislative recommendations. Private individuals and organizations have made innumerable studies and recomendations. While various proposals have been made over the years, the continuous line of development leading to the present bill is clear and illuminating.

1946 U.S. Code Cong. Serv. at 1195. In reviewing the 1937 report of the Presidential Committee on Administrative Management, the Judiciary Committee noted:

> The problem has been how to deal with (administrative functions) in our complex governmental setup, without unduly interfering with necessary governmental operations.

1946 U.S. Code Cong. Serv. at 1196. By noting the 1938 Senate hearings on the creation of an administrative court, the committee stated:

> There is need for a simple and standard plan of administrative procedure, together with the statement of legal and enforceable guides for administrative officers and agents in their daily operations. In short, an important object of any legislation in this field is not only to provide judicial redress but to assure administrative fairness in the beginning so that litigation may become unnecessary.

1946 U.S. Code Cong. Serv. at 1196. In discussing the substance of the APA, the Judiciary Committee stated:

> Manifestly the bill does not unduly encroach upon the needs of any legitimate government operation, although it is of course operative according to its terms even if it should cause some administrative inconvenience or changes in procedure.
>
> * * *
>
> The bill is an outline of minimum essential rights and procedures. Agencies may fill in details, so long as they publish them. It affords private parties a means of knowing what their rights are and how they may protect them, while administrators are given a simple framework upon which to base such operations as are subject to the provisions of the bill.
>
> * * *
>
> In the "rule making" (that is, "legislative") function it provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before the issuance of general regulations (sec. 4).
>
> * * *

> The public-information provisions of section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency "housekeeping" arrangements may be involved. Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases.

1946 U.S. Code Cong. Serv. at 1024-5.

Thus, it is clear that the Congressional intent in formulating the APA was more than a desire to standardize the procedures utilized by the various agencies but included an attempt to provide for procedures that would recognize the fundamental fairness of governmental operations being conducted in full view of the governed.

In issuing its Ruling 1975-12, the FEA has stipulated that the procedures in 5 U.S.C. § 553 were not followed, at least as to section 3 of the ruling. The government contends that the ruling qualifies as an interpretative rule under 5 U.S.C. § 553(b)(A) and, as such, does not require notice or hearing. However, for this agency determination to survive, the rule promulgated cannot be more than an "internal agency 'housekeeping' arrangement." Such is simply not the case here.

The creation of the FEA by Congress through the Federal Energy Administration Act was accompanied by administrative provisions the FEA was to apply. These provisions were contained in section 7 of the act and state, in part:

> (i)(1)(A) Subject to paragraphs (B), (C), and (D) of this subsection, the provisions of subchapter II of chapter 5 of title 5, United States Code, shall apply to any rule or regulation, or any order having the appli-

cability and effect of a rule as defined in section 551(4) of title 5, United States Code, issued pursuant to this Act, including any such rule, regulation, or order of a State or local government agency, or officer thereof, issued pursuant to authority delegated by the Administrator.

(B) Notice of any proposed rule, regulation, or order described in paragraph (A) shall be given by publication of such proposed rule, regulation, or order in the Federal Register. In each case, a minimum of ten days following such publication shall be provided for opportunity to comment; except that the requirements of this paragraph as to time of notice and opportunity to comment may be waived where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation or order. In addition, public notice of all rules, regulations, or orders described in paragraph (A) which are promulgated by officers of a State or local government agency shall to the maximum extent practicable be achieved by publication of such rules, regulations, or orders in a sufficient number of newspapers of statewide circulation calculated to receive the widest possible notice.

(C) In addition to the requirements of paragraph (B), if any rule, regulation, or order described in paragraph (A) is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, an opportunity for oral presentation of views, data, and arguments shall be afforded. To the maximum extent practicable, such opportunity shall be afforded prior to the issuance of any such rule, regulation or order. A transcript shall be kept of any oral presentation.

(D) Any officer or agency authorized to issue the rules, regulations, or orders described in paragraph (A)

> shall provide for the making of such adjustments, consistent with the other purposes of this Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens and shall, by rule, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, rescission of, exception to, or exemption from, such rules, regulations and orders. If such person is aggrieved or adversely affected by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the officer or agency and may obtain judicial review in accordance with paragraph (2) of this subsection when such denial becomes final. The officer or agency shall, by rule, establish appropriate procedures, including a hearing where deemed advisable by the officer or agency, for considering such requests for action under this paragraph.

Thus, under these procedures, it would appear that the congressional intent in setting a procedural requirement in addition to those of the APA was to have the FEA conduct its operations subject to even more public scrutiny than the average administrative agency. Additionally, under section 7(i)(1)(c), quoted above, it would appear that even if a ruling of the FEA were deemed to be interpretative under 5 U.S.C. § 553(b)(A), it would still be required to afford an opportunity for public comment if it were likely to have a "substantial impact" on either the national economy or large numbers of individuals or businesses.

The evidence at trial shows that at the time the wells were commingled, one or more of the producing formations involved produced less than ten barrels of crude oil per day. Acting on the clear legislative statement that wells producing less than ten barrels per day were to be exempt from the pricing restrictions, the producers treated the recovered crude oil as coming from separate wells and attempted to apportion the crude oil among the producing formations and

set its price accordingly. The FEA then adopted its regulation, without notice or opportunity for comment, which determined that the producers were selling crude oil at illegal prices. The FEA now adopts the position that the regulation is valid since it is practically impossible to determine which oil producing formation is actually contributing a specific quantity of crude oil to the commingled total. The FEA in section 3 of Ruling 1975-12 makes reference to justifying treating multiple completion wells as separate wells at each producing formation because of the capital investment separate single completion wells would require; however, the statute exempting wells producing less than ten barrels of crude oil per day is silent as to justifying the exemption on grounds of capital investment required. Finally, as a result of its Ruling 1975-12, the FEA is now requiring the producers to reimburse substantial sums of money, in at least one instance an amount in excess of $500,000.00.

Additionally, the FEA application of Ruling 1975-12 would seem to mandate inconsistent results. Assume the case where there exists a well casing penetrating through three distinct oil producing formations, each of which has been shown to have an average daily production of crude oil of four barrels. If the well is completed as a multiple completion well, Ruling 1975-12 will permit all twelve barrels recovered per day to be sold at the unregulated price. However, if the well is completed as a commingled well, Ruling 1975-12, as applied here, prohibits the sale of any of the crude oil recovered at the unregulated price. Inconsistencies of this sort are the kinds of situations that the notice requirements of the Administrative Procedure Act sought to avoid by mandating full and informed agency action.

Accordingly, the court concludes that section three of Federal Energy Administration Ruling 1975-12 is void for lack of proper agency procedures and consideration for its adoption.

2. *Ceiling Price.*

In regard to its second cause of action, plaintiff alleges that on August 19, 1973 defendant promulgated a regulation stating that the ceiling price for crude oil is to be the highest posted price at 6:00 a.m. on May 15, 1973. Plaintiff further alleges that "posted price" was not defined until November 30, 1973 when it was stated to be ". . . a publicly circulated written offer to purchase."

Testimony at trial showed that Sun Oil Company initiated a premium offer whereby those producers agreeing to continue to sell their crude oil to Sun Oil Company, for a period of twenty months commencing May 1, 1973, could elect to receive a bonus option. The two options offered were:

1. $4.15 per barrel or Sun Oil Company's posted price plus 15 cents per barrel, whichever was higher, or
2. 15 cents per barrel plus the arithmetical average of the posted price of Sun Oil Company, Continental Oil Company and Atlantic Richfield.

Plaintiff's contention is that the 15 cent inducement bonus offered by Sun Oil Company constituted a part of the highest posted price as used in determining the ceiling price for crude oil. The court does not agree.

In adopting the November 30, 1973 definition of "posted price," the government appears to have been merely adopting the definition of posted price as used by the industry. Additionally, the options offered by Sun Oil Company seem to state that the fifteen-cent bonus was not contemplated by Sun as constituting a part of its posted price as the bonus was to be computed with reference to Sun's posted price.

At trial only one witness was produced in reference to this issue. Mr. James E. Ragsdale, Sun Oil Company's Manager of Western Region Crude Oil Purchasing and Sales,

was called by plaintiff and gave the following testimony on direct examination:

> Q. All right, Mr. Ragsdale, what is your understanding — you have been in the crude oil purchasing business a number of years — what is your understanding of the term "posted price"?
>
> A. My understanding of a "posted price" is a printed document which is widely circulated in the oil industry, and which indicates a price a purchaser is willing to pay for crude oil and condensate.

Transcript, p. 212. There was no evidence offered to show that any of the parties ever considered the posted price of crude oil to be anything other than as defined by the government. Additionally, there was no evidence offered to show that the adoption of the definition of "posted price" was anything other than the lawful exercise of regulatory powers.

Accordingly, and for the reasons stated herein, it is the conclusion of this court that section 3 of Ruling 1975-12 of the Federal Energy Administration is void and without legal effect and that the definition of "posted price" as adopted by the Federal Energy Administration is proper in that it does not include bonus offers over and above written offers.

ORDERED this 29th day of June, 1979.

(s) *H. Dale Cook*
United States District Judge

[APPENDIX]

JUDGMENT

[Caption omitted in printing]

Based upon the Memorandum Opinion of even date, it is by the court ordered, adjudged and decreed that section 3 of Ruling 1975-12 issued by the Federal Energy Administration on August 29, 1975 is void and without legal effect. Furthermore, it is the additional judgment of this court that an unwritten bonus offer is not to be used by the Federal Energy Administration in calculating the ceiling price of crude oil.

DONE this 29th day of June, 1979.

(s) *H. Dale Cook*
United States District Judge